LEE CHIN CHENG DENGKIL OIL PALM

v.

KAPLANDS SDN BHD

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
RICHARD MALANJUM JCA
ARIFFIN ZAKARIA JCA
[CIVIL APPEAL NO: W-02-898-2001]
22 NOVEMBER 2002

CONTRACT: *Sale and purchase of land - Breach - Termination of agreement and refund of deposit - Existence of private caveat at completion date - Whether caveat an encumbrance within terms of agreement - Variation of completion date - Whether failure to deliver land free of encumbrances entitles purchaser to abort agreement - Notice to terminate agreement - Whether necessary*

LAND LAW: *Caveat - Private caveat - National Land Code, s. 322 - Whether tantamount to an encumbrance - Whether applies to sale and purchase agreement*

The plaintiff entered into a sale and purchase agreement with the defendant to purchase a piece of land from the defendant. The plaintiff submitted that it was agreed between the parties that the said land would be free from encumbrances at the completion date. The plaintiff paid a deposit of 10% of the purchase price with the balance due on or before the completion date. Subsequently, the plaintiff terminated the agreement and sought for a refund of the deposit, contending that there was a private caveat lodged by a third party, namely MPI Paper Mills, still existing at the completion date. The defendant claimed that they were entitled to forfeit the deposit as the plaintiff had wrongfully terminated the agreement. It was argued that the said caveat was not an encumbrance and that the agreement had been concluded. The High Court judge however found for the plaintiff. This was an appeal by the defendant against the said decision.

Held:
Per Ariffin Zakaria JCA

[1] The effect of a private caveat is to freeze the register at least until the caveat is removed. The word "encumbrance" appearing in the said

agreement, read within the context of the National Land Code, would include a private caveat such as the one entered by MPI Paper Mills. (pp 758 e & 759 e)

[2] It had never been agreed by the parties that the said caveat would not be treated as an encumbrance as per the agreement. Such an agreement would have been expressly encapsulated by the parties. The defendant had the obligation to ensure that the land in question would be free from all encumbrances and with vacant possession on the completion date. (pp 760 g-h & 761 a, f)

[3] Whilst the parties had previously agreed to vary the completion date to the one at present, in effect this meant that the plaintiff had the option to abort the purchase if the defendant failed to clear the title of the said land from all encumbrances at the specified date, which was what the plaintiff did. (p 766 d)

[4] The plaintiff was not required to give the defendant notice to terminate the agreement as previously agreed in light of the variation of the terms of the agreement. The plaintiff's letter to the defendant sent the next day after the completion date purporting to terminate the agreement was legally valid and effective. (pp 766 g-h & 767 a-b)

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintiff telah memasuki suatu perjanjian jual beli dengan defendan untuk membeli sebidang tanah daripada defendan. Plaintif menghujah bahawa telah dipersetujui antara pihak bahawa tanah tersebut akan bebas dari bebanan pada tarikh penunaian. Plaintif telah membayar deposit sebanyak 10% daripada harga pembelian dengan bakinya perlu dibayar pada atau sebelum tarikh penunaian. Plaintif kemudiannya menamatkan perjanjian tersebut and meminta pemulangan deposit, sambil mengadu bahawa terdapat suatu kaveat persendirian yang telah didaftar oleh pihak ketiga, yakni MPI Paper Mills, masih wujud pada tarikh penunaian. Defendan menghujah bahawa mereka berhak merampas deposit tersebut kerana plaintif telah menamatkan perjanjian tersebut dengan tidak sah. Telah diajukan bahawa kaveat tersebut bukan suatu bebanan dan perjanjian tersebut telah disempurnakan. Namum begitu, hakim Mahkamah Tinggi telah memihak kepada plaintif dalam keputusannya. Ini adalah rayuan defendan terhadap keputusan tersebut.

Diputuskan:
Oleh Ariffin Zakaria HMR

[1] Kesan sesuatu kaveat persendirian adalah untuk membekukan pendaftaran sehingga kaveat tersebut dibatalkan. Perkataan "encumbrance" yang terkandung dalam perjanjian tersebut, bila dibaca dalam konteks Kanun Tanah Negara, merangkumi kaveat persendirian seperti yang telah difailkan oleh MPI Paper Mills.

[2] Pihak-pihak berkenaan tidak pernah bersetuju bahawa kaveat tersebut tidak akan dianggap sebagai suatu "encumbrance" seperti yang tersebut dalam perjanjian tersebut. Persetujuan sebegitu akan dibuat secara lisan oleh pihak-pihak. Defendan mempunyai tanggungjawab untuk memastikan bahawa tanah berkenaan bebas dari bebanan dan dengan milikan kosong pada tarikh penunaian.

[3] Manakala pihak-pihak berkenaan telah bersetuju sebelum ini untuk mengubah tarikh penunaian kepada masa yang kini, efeknya membawa maksud bahawa plaintif mempunyai pilihan untuk membantutkan pembelian sekiranya defendan gagal untuk membebaskan hak milik tanah tersebut daripada semua bebanan pada tarikh yang ditetapkan, yang mana telah dilakukan oleh plaintif.

[4] Plaintif tidak perlu untuk memberi defendan notis untuk menamatkan perjanjian tersebut seperti yang dipersetujui sebelum ini, berasaskan pengubahan kepada terma-terma perjanjian. Surat plaintif yang dihantar kepada defendan sehari selepas tarikh penunaian yang mana bermaksud untuk menamatkan perjanjian tersebut adalah sah dan terpakai.

Rayuan ditolak dengan kos.]

Case(s) referred to:
Chooi Siew Cheong v. Lucky Height Development Sdn Bhd [1995] 2 CLJ 11 ***(refd)***
Karuppannan v. Balakrishnen (Chong Lee Chin & Ors (third party) [1994] 4 CLJ 479 ***(refd)***
Leggot v. Barrett [1980] Ch D 306 ***(refd)***
Mewah Plus Property Sdn Bhd v. Kluang District Government Servant Co-Operative Housing Society Ltd [2000] 2 CLJ 236 ***(refd)***
Railway Assets Corporation v. Elmspark Holding Sdn Bhd [1997] 4 CLJ 136 ***(refd)***
Woon Kim Poh v. Sa'amah Hj Kasim [1987] 1 MLJ 400 ***(refd)***

Legislation referred to:
National Land Code, s. 322(2)

For the applicant - Andrew Chiew Ean Vooi; M/s Lee Hishamuddin
For the respondent - Mahinder Singh; Mahinder Singh Dulku & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S7-(4)-22-321-1998]

Reported by M Maheswaran

JUDGMENT

Ariffin Zakaria JCA:

The appellant (the defendant in the court below) is the registered owner of land known as Lot 6984, Mukim Dengkil, Daerah Sepang, Selangor ("the said land"). By a sale and purchase agreement ("the agreement") dated 2 July 1997 the respondent (the plaintiff in the court below) agreed to purchase the said land at the price of RM39,808,750. Upon execution of the agreement the respondent paid the sum of RM3,980,875 being 10% deposit pursuant to cl. 2.1 of the agreement. According to cl. 2.2 the balance of the purchase price ("the balance sum") is to be paid on or before the expiry of 90 days from the application date or within seven days from the receipt of approval from the F.I.C., whichever shall be the later. Through exchange of letters it was agreed between the parties that the date of payment of the balance sum shall be 19 February 1998 ("the completion date").

At the material time three private caveats were lodged against the said land by:

(i) MPI Paper Mills Sdn. Bhd. dated 9 January 1995 ("the MPI caveat");

(ii) Straw Paperboard Industries dated 24 October 1997; and

(iii) Golden Skyline Sdn. Bhd. dated 18 October 1998.

However, both before this court and the court below, the respondent only relied on the MPI caveat as a ground in support of its contention that the title of the said land was not free from encumbrances on the completion date. For that reason the respondent refused to pay the balance sum on the completion date; and pursuant to cl. 10.2 of the agreement the respondent aborted the agreement and claimed for the refund of the 10% deposit paid to the appellant.

The appellant, however, maintains that the respondent had wrongfully terminated the agreement and in the circumstances, the appellant was entitled to forfeit the 10% deposit. The learned trial judge agreed with the respondent; and entered judgment in favour of the respondent. The appellant now appeals to this court against the decision of the learned judge.

The premise upon which the respondent sought to terminate the agreement is borne out in the respondent's letter of 20 February 1998, the material part of which reads:

> Your clients had previously agreed *vide* your letter of 24 November 1998, that at the end of the three months' period which was determined to be 19th February 1998, the title is to be free from encumbrances, other than the BOC Charge and the caveats filed by our client and/or its financier. The caveat filed by MPI Paper Mills Sdn. Bhd. was never agreed to be an exception to the abovementioned term. Further it was never agreed that our client is to present for registration of the withdrawal of any caveat on behalf of your client.
>
> We have made a further search at the Land Office Shah Alam today and we note that the caveat filed by Straw Paperboard Sdn. Bhd. is still not lifted.
>
> As the title is still encumbered, our client now exercises the option to abort the purchase of the subject land and accordingly requests for immediate refund of the moneys due to them.

The respondent in the main relies on cl. 2.1 of the agreement which stipulates, *inter alia*, that the said land shall be free "from all encumbrances and with vacant possession". It is common ground that on 20 February 1998 the MPI caveat was still in force against the said land.

The first issue raised in this appeal is whether the MPI caveat is an "encumbrance" for the purpose of the agreement. The learned counsel for the appellant contended that the word 'encumbrances" as found in the agreement does not include private caveat. The agreement does not define the word "encumbrances". The learned trial judge relying on the case of *Mewah Plus Property Sdn. Bhd. v. Kluang District Government Servant Co-Operative Housing Society Limited* [2000] 2 CLJ 236 and the case of *Karuppannan v. Balakrishnen (Chong Lee Chin & Ors., third parties)* [1994] 4 CLJ 479 held that the MPI caveat, which is a private caveat, is an encumbrance within the context of the National Land Code ("the NLC").

The nature and effect of private caveat is governed by s. 322(2) of the NLC which provides that:

> 2. The effect of any private caveat expressed to bind the land itself (or an individed share in the land) shall, subject to subsections (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of:
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> (a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;

(b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and

(c) any lien-holder's caveat in respect thereof [:]

(Provided that where the claim is in respect of a part of the land, the caveat binds the whole land and where the claim is in respect of an undivided share in the land, the caveat binds the whole of the undivided share in the land.)

The Supreme Court in *Woon Kim Poh v. Sa'amah bt. Hj. Kasim* [1987] 1 MLJ 400 explained the effect of a private caveat. At p. 402 it said:

> The effect of a private caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. See also *Eng Mee Yong & Ors. v. V. Letchumanan*. A caveat freezes the register at least until the caveator has taken court action to determine his claim – Judith Sihombing, page 588. In the Torrens system where registration is the very basis of the system the prohibition in section 322(2) must be strictly complied with. In other words the Registrar is statutorily obliged to refuse the registration because to do so would be a violation of an expressed provision of the National Land Code.

In short the effect of private caveat is to freeze the register at least until the caveat is removed. In similar vein Gopal Sri Ram JCA in *Mewah Plus Property v. Kluang District Government Servants Co-operative (supra)* at p. 241 said:

> With due respect to counsel for the appellant, we are unable to agree with his argument. In our judgment, the word 'encumbrances' in the two clauses already quoted refers to some impediment in the registered title to the said property which prevents the registration of title from the respondent to the appellant. As was pointed out to counsel during argument, 'encumbrances' in the context of the agreement in question means an encumbrance in the National Land Code sense. As to what amounts to an encumbrance in the context of the National Land Code, reference may be usefully made to two decisions of the Privy Council on the point.
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> The first *Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267, where Lord Diplock when delivering the advice of the Board said (at p. 269):
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> > In the National Land Code it is s. 340 that expressly provides that the title of a person registered as proprietor of any land shall be indefeasible. The only exceptions are where there has been fraud, misrepresentation, forgery or an *ultra vires* acquisition purporting to have been made under statutory authority. None of these exceptions apply to the instant case. Interests in land, short of proprietorship, which are capable of being registered are leases, charges and easements. If registered they would amount to encumbrances within the meaning of a covenant against encumbrances; but unless registered they do not derogate from the

> unencumbered title of the registered proprietor of the land. Claims to be entitled to the proprietorship of land or a registrable interest in land, whether or not they are the subject of litigation, are not registrable as encumbrances on a registered title. Instead they are protected by the system of private caveats which, while leaving the registered title unqualified and intact, have the effect of preventing any dealing with it by the registered proprietor so long as the caveat remains in force; that is, until it is removed from the register. The way in which this system of protection operates was dealt with by their Lordships in the recent case of *Eng Mee Yong & Ors. v. V. Lechumanan* [1979] 2 MLJ 212, to which reference may conveniently be made.

> The second is *Letchumanan Chettiar v. Palaniappa Chettier* [1983] 1 MLJ 6, where (at p. 9) Lord Templeman referred to a caveat upon the register as 'the only relevant encumbrance', thereby rendering a wider meaning to that expression than that given it by Lord Diplock in *Damodaran v. Choe Kuan Him (ibid)*.

(See further the case of *Karuppanan v. Balakrishnen (supra)* cited by the learned judge.)

Based on the above authorities we agree with the learned judge that the word "encumbrances" read within the context of the NLC would include a private caveat. Therefore, the word "encumbrances" as used in the agreement would certainly include the MPI caveat.

The further contention by learned counsel for the appellant is that in construing the word "encumbrances" the court is entitled to look at the circumstances leading to the agreement. In support he cited the case of *Chooi Siew Cheong v. Lucky Height Development Sdn. Bhd.* [1995] 2 CLJ 11. In that case Chong Siew Fai FCJ (as he then was) at p. 20 said:

> Regard must also be had to any surrounding circumstances, if any, which might legitimately be taken into consideration. In *Chamber Colliery Co. Ltd. v. Twyerould* [1915] 1 Ch. 268n at p. 272, Lord Watson said:
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> > I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses, and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.
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> And, in *Barton v. Fitzgerald* [1812] 15 East 530 at p. 541, Lord Ellenborough CJ said:

> It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*: every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done.

(See also *Railway Assets Corporation v. Elmspark Holding Sdn. Bhd.* [1997] 4 CLJ 136.)

In the present case, it is not disputed, that, in the course of the negotiations the respondent was informed of the MPI caveat. This is evident from the exchange of letters between solicitors for the parties. (See pp. 476 to 492 of the appeal record.) This is supported by the witness statement of Dato' Iqbal bin Kuppa Pitchai Rawther (PW1). (See Q & A 24 at p. 648 of appeal record.) DW2 (Mr. Lee Boon Joo) in his witness statement at pp. 659 to 660 of the appeal record went even further to say that Mr. Chan Kai Kum, who was the director of the plaintiff, and Encik Shahrom, the respondent's solicitors, in the course of the negotiations were specifically informed of MPI's interest in the said land and that the respondent should not regard MPI caveat as an encumbrance for the purpose of the agreement. He informed the court that both Mr. Chew Kai Kum and Encik Shahrom agreed to this proposal. In his answer to question no. 30 he said:

> It was agreed by Mr. Chew Kai Kum and En. Shahrom that the MPIPM's private caveat should not be regarded as an encumbrance to the land. The Defendant accepted that as well. The Defendant had acted on that Plaintiff's agreement because the whole agreement would not go through otherwise.

Having considered the appellant's submission on this issue, we find that it is devoid of any merit. Our reason for saying so, is that if the defendant's allegation that the parties were in agreement that the MPI caveat should not be treated as an encumbrance for the purpose of the agreement then the parties could have expressly said so in the agreement itself. The evidence of DW2 merely shows that the respondent was informed of the MPI caveat prior to the execution of the agreement; and nothing more. That being the case, we find it hard to accept the appellant's contention that the parties have agreed that the MPI caveat was not to be regarded as an encumbrance for the purpose of the agreement.

Further, we agree with the learned judge that if there is any agreement between the parties to vary or amend any terms of the agreement, so as to disregard the MPI caveat for the purpose of the agreement, such variation or amendment will have to be evident in writing, as required by cl. 21.3. The said clause

clearly stipulates that no amendement of, or addition to, the provisions of the agreement shall be binding or effective unless it is in writing signed by all the parties. We find there is no such agreement between the parties.

The appellant further contended that since the MPI caveat was in existence prior to the signing of the agreement the respondent is, therefore, deemed to have accepted it as the parties have agreed to accept the said land "... in its present state and condition subject to all conditions of title ..." as per recital (B) of the agreement. The learned judge rejected this argument. In his judgment he said:

> In my view, the phrase 'in its present state and condition' does not replace the term 'free from all encumbrances and with vacant possession'. Moreover, this phrase appears in the recital, it cannot override the clauses 2.1 and 11.1 as contained in the S & P Agreement. Thus 'free from all encumbrances and with vacant possession' remains a fundamental term of the S & P Agreement and at the completion date, the said land was not 'free from all encumbrances and with vacant possession.' It is clear that clauses 2.1 and 11.1 had been breached.

We entirely agree with the learned judge. As observed by Brett LJ in *Leggot v. Barrett* [1980] Ch. D. 306 at p. 311:

> If there is doubt about the construction of the governing words of that document, the recital may be looked at in order to determine what is the true construction; but if there is no doubt about the construction, the right of the parties are governed entirely by the operative, part of the writing or the deed.

Similarly in the present case, we are of the view that the phrase "... in the present state and condition subject to all conditions of title ..." as found in recital (B) could not override clauses 2.1. and 11.1. of the agreement. In short, in accordance with the terms of the agreement, the appellant is under obligation to ensure that the said land is free from all encumbrances and with vacant possession on the completion date.

Reverting to the facts in the present case, it is common ground that on 19 February 1998, ie, the new completion date, the MPI caveat was still in force against the said land; and that had prompted the plaintiff through its solicitors to write to the defendant's solicitors purporting to abort the agreement pursuant to cl. 2.5 of the agreement. The next issue is whether, the respondent had complied with the terms of the agreement in bringing the agreement to an end. This calls for our consideration cll. 2.5 and 10 of the agreement. Clause 2.5 provides as follows:

> 2.5. If at the time of presentation of the Transfer in favour of the Purchaser the title is not free from encumbrances other than caveats filed by the Purchaser and/or its Financier the Purchaser shall grant to the Vendor a period of one (1) month to clear the title to enable presentation of the Transfer failing which the Purchaser shall have the option of to abort the purchase and upon exercise of such option by the Purchaser the Vendor shall refund to the Purchaser the Deposit and all other moneys paid by the Purchaser to the Vendor or to the Vendor's Solicitors pursuant to the provisions of this Agreement including interest (if any) in exchange for redelivery of vacant possession of the Said Property and all documents delivered to the Purchaser's Solicitors and/or the Financier's Solicitors pursuant to the provisions of this Agreement except for the Said Transfer which the Purchaser's Solicitors are authorized to make an application to the Collector of Stamp duty for cancellation and refund of the stamp duty paid thereon.

Therefore, according to this clause the appellant is given a month's grace to clear the title of any encumbrance other than the caveats filed by the respondent and/or its financier. If the appellant failed to clear the title of such encumbrances after the expiration of the said period then and only then would the respondent be entitled to abort the purchase.

The other clause which governs default by parties is cl. 10 of the agreement which reads as follows:

> 10. DEFAULT BY THE PARTIES.
>
> 10.1 If the Purchaser shall default in payment of the Balance of Purchase Price or otherwise in discharging the obligations of the Purchaser in connection with payment or satisfaction of the Balance of Purchase Price in accordance with the terms and conditions set out herein, or if the Purchaser shall default in any other obligations on the part of the Purchaser to be performed and observed in this Agreement, the Vendor shall be entitled to terminate this Agreement forthwith by notice in writing to the Purchaser and thereafter the Deposit shall be absolutely forfeited to the Vendor as agreed liquidated damages but all other payment by the Purchaser towards the Purchase price (if any) shall be refunded to the Purchaser free of interest in exchange whereof the Purchaser shall return or cause to be returned to the Vendor all documents delivered to the Purchaser's Solicitors and/or the Purchaser's Financiers or its Solicitors pursuant to the provisions of this Agreement together with valid and registrable withdrawal of caveat lodged by the Purchaser and/or the Purchaser's Financiers accompanied by the necessary registration fees. The Purchaser shall also redeliver vacant possession of the said property if vacant possession has already been delivered to the Purchaser. Thereafter this Agreement shall be null and void and of no further force or effect

and neither party shall have any claim whatsoever against the other and the Vendor shall be entitled, at its absolute discretion to sell or otherwise deal with the Said Property in such manner as the Vendor shall deem fit and keep any profit made on any such resale or dealing.

10.2. If the Vendor fails to complete the sale of the Said Property to the Purchaser in accordance with the terms and conditions set out herein or if the Vendor shall default in any other obligations on the part of the Vendor to be performed and observed in this Agreement and such default is not rectified by the Vendor within seven (7) days of notice of such default given by the Purchaser, the Purchaser shall be entitled to at its option to either:

(a) take such action as may be available to the Purchaser at law to claim for specific performance of this Agreement together with all relief flowing therefrom; OR

(b) terminate this Agreement by notice to the Vendor whereupon the Vendor shall refund to the Purchaser the Deposit together with any sum in excess thereof paid by the Purchaser towards the Purchase Price free of interest in exchange wherefore the Purchaser shall return or cause to be returned to the Vendor all documents delivered by the Vendor or the Vendor's Solicitors to the Purchaser's Solicitors and/ or the Purchaser's Financiers or its Solicitors together with valid and registrable withdrawal of caveats lodged by the Purchaser and/or Purchaser's Financiers accompanied by the necessary registration fees.

Thereafter this Agreement shall be null and void and of no further force or effect and neither party shall have claim whatsoever against the other and the Vendor shall be entitled at its absolute discretion to sell or otherwise deal with the Said Property in such manner as the Vendor shall deem fit.

On the facts in the present case, the learned judge took the view that cl. 10.2 of the agreement is the governing clause as regard to the procedure to be followed by the respondent in order to abort the purchase of the said land. However, the learned judge made no reference whatsoever to cl. 2.5 above. We reserve our comment on this to the later part of our judgment. In his judgment the learned judge considered the circumstances leading to, and culminating in the termination of the agreement by the respondent; and he said:

It is noted that what the plaintiff needs to do when a breach of the S & P Agreement occurs, is that he must serve on the defendant a seven (7) days' notice of such default, and thereafter he is entitled to (a) specific performance or (b) terminate the S & P Agreement.

From the facts of the case, the completion date was 19.2.98 and the plaintiff rescinded the S & P Agreement on the following day, ie, 20.2.98. It seems that in its anxiety to rescind the S & P Agreement it fails to observe clause 10.2. The plaintiff submitted that there is no requirement of a 7-day notice in view of the exchange of letters between the plaintiff and the defendant's letters, as shown below:

> In the plaintiff's letter dated 21st November 1977 (pages 37 and 38 of Bundle B), para (d) states:
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> > (d) that at the end of three months period as stipulated in (a) above the Vendor fails to clear the title from encumbrances, Kaplands shall have the option to abort the purchase and upon exercise of such option by Kaplands, the Vendor shall refund to Kaplands the deposit already paid including interest or to grant a further extension of time thereon.
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> In reply, the defendant's solicitor in its letter dated 24th November 1997 stated that 'we confirm that our clients have agreed to the following pursuant to your letter to us dated 21st November 1997' and repeated para d (page 42 of Bundle B).
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> In his testimony (at page 20 of Notes) DW2 (a director of the defendant) rationalized that:
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> 10.2 notice was not given because of para (d) of the solicitor's letter.

The learned counsel for the appellant contended that the learned judge's finding is not supported by the evidence before the court. He contended that para. (d) of the respondent's letter dated 21 November 1997 does not have the effect, of varying cll. 2.5 and 10.2 of the agreement.

Looking at the respondent's letter of 21 November 1997, it appears that the respondent was concerned over certain private caveat that had been entered against the said land and this had prompted the respondent to propose that the appellant be given a period of three months to clear the title from all encumbrances, other than the caveats filed by the respondent and/or its financier. It is further proposed in sub-para. (d) of the letter that if at the end of the three months period the appellant still fails to clear the title from those encumbrances, the respondent shall have the option to abort the purchase and upon exercise of such option by the respondent the appellant shall refund to the respondent the deposit already paid including interest or to grant a further extension of time thereon. The appellant's reply to the respondent's letter of 21 November 1997 is contained in its letter of 24 November 1997. The material part of the letter reads as follows:

We refer to our letter of even date and confirm that our clients have agreed to the following pursuant to your clients' letter to us dated 21st November 1997:

(a) That our clients be given a period of three (3) months to clear the title from encumbrances other than the caveats filed by Kaplands Sdn. Bhd. and/or its fiancier ("Purchaser's Caveats") and the Charge in favour of Bank of Commerce (M) Berhad ("BOC Charge") in respect of which are have already obtained a Discharge of Charge;

(b) That payment of the balance purchase price be made within seven (7) days of notification to you or your clients that the title is free from encumbrances other than the Purchaser's Caveat and the BOC Charge.

(c) ...

(d) If at the end of the three (3) months period stipulated in (a) above, our clients fail to clear the title from encumbrances other than the BOC Charge and the caveats filed by your clients and/or its financier, your clients will have the option to abort the purchase and upon exercise of such option our clients will refund to your clients the deposit paid including interest unless a further extension is agreed upon.

(e) In the event your clients fail to pay the balance purchase price together with interest within seven (7) days of removal of the encumbrances other than the Purchaser's Caveats and the BOC Charge then such default will amount to a default under Clause 10.1 of the Sale and Purchase Agreement dated 2nd July, 1997 and the provisions of Clause 10.1 shall apply.

Apart from the above variations all other terms and conditions of the Sale and Purchase Agreement dated 2nd July, 1997 shall prevail.

Thus, from the appellant's own letter, cited above, it is patently clear that the parties have agreed to vary or amend particular terms of the agreement to the extent stated in the said letter. This brings us to the main issue in contention: what is the effect of the variation or amendment, as agreed between the parties, on cll. 2.5 and 10.2 of the agreement.

The respondent contended, by virtue of the said variation, cll. 2.5 and 10.2 of the agreement are no longer applicable and of no further effect. To put it simply the respondent's case is that by reason of the said variation the parties have agreed to a definite time frame for the appellant to clear the title of certain encumbrances failing which the respondent is given the option to abort the purchase. The respondent contended this is clearly intended to override cls. 2.5 and 10.2 of the agreement otherwise the variation would be devoid of any meaning whatsoever. Reading the judgment of the learned trial judge

we think, it is implicit in his judgment that he agreed with the respondent's contention that cl. 2.5 of the agreement is no longer of any effect in view of the agreed variation. And as regard cl. 10.2, he said:

> The Defendant seemed not to be serious about this clause 10.2 because upon the receipt of the termination letter, the Defendant served upon the Plaintiff a letter claiming for the forfeiture of the deposit. By the same token analogous to clause 10.2, the Defendant had not served a 7 day notice to the Plaintiff, as clause 10.2 has imposed a duty to serve notice on one party, it is equally applicable to the other party, otherwise it offends the notion justice.
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> It is clear that in view of this evidence, breach of clause 10.2 is not fatal. By acts of the parties, they are no longer bound strictly by clause 10.2.

We agree with the learned judge that by necessary implication cl. 2.5 is no longer applicable in view of the variation, otherwise as rightly contended by the respondent, the variation would be devoid of any effect whatsoever. We arrived at this conclusion on the premise that the parties had, under the new terms, agreed to give the appellant a specific time frame to clear the title of the said land of all the encumbrances, other than those expressly excepted, failing which the respondent is given the option to abort the purchase. This in our view is clearly intended to override the provisions of cl. 2.5 of the agreement.

The only remaining issue is whether the respondent is still required to give the requisite notice as stipulated in cl. 10.2 of the agreement when it decides to abort the purchase. Needless to say that no such notice was given to the appellant by the respondent. The learned judge held that the fact that the respondent failed to give such notice is not fatal to respondent's case on the ground that the appellant likewise failed to give such a notice to the respondent in purporting to forfeit the deposit. He concluded by saying that by their acts the parties are no longer bound strictly by cl. 10.2. We agree with the learned judge that, in the circumstances, the respondent is no longer required to give the notice as stipulated in cl. 10.2; but for different reasons. Firstly, we are of the view that from the plain reading of cl. 10.2 it is clear that it applies only to the respondent as the purchaser and not the appellant who is the vendor. For that reason we are of the view, contrary to what was held by the learned judge, that there is no obligation on the part of the appellant to give the respondent a notice under cl. 10.2. In other words cl. 10.2 only applies to the respondent. However, by virtue of the variation to the terms of the agreement as embodied in sub-para. (d) of the appellant's own letter of 24 November 1997, we are of the view that it is no longer necessary for the respondent to give a notice under cl. 10.2 of the agreement.

Under the new terms, as agreed between the parties, what the respondent (purchaser) need to do at the end of the three months period is to see whether the title is free from all encumbrances other than the BOC charge and the caveats filed by the respondent or its financier. If the answer is in the negative, then the respondent has the option, without more, to abort the purchase or to grant a further extension of time to the appellant. If the respondent is not desirous of granting a further time then what the respondent need to do is to give a notice, as was done by the respondent, to the appellant that it had chosen to abort the purchase and with such notice the respondent is immediately entitled to the refund of the deposit. No further notice under cl. 10.2 is required. For these reasons, we are of the view that the respondent's letter of 20 February 1998 purporting to terminate the agreement is legally valid and effective.

For the above reasons we find no merit in this appeal and we dismissed the same with costs. We ordered that the deposit be paid to the respondent towards account of taxed costs.